

**IN THE SUPREME COURT OF MISSOURI**

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**STATE EX REL. JAMES DEAN HODGES,**

**Relator,**

**vs.**

**THE HONORABLE JODIE ASEL and GEORGE LOMBARDI,  
Director Missouri Department of Corrections,**

**Respondents.**

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**On a Writ of Mandamus to  
the Circuit Court of Boone County, Missouri  
Thirteenth Judicial Circuit**

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**BRIEF OF RESPONDENTS**

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## STATEMENT OF FACTS

Relator James Hodges resides at the Ozark Correctional Center in Fordland, Missouri due to the sentence imposed by the Boone County Circuit Court in *State v. James Dean Hodges*, Case No. 13BA-CR00008-01. (Resp. Ex. A at 3; Resp. Ex. B). The State charged Hodges with one count of Driving While Intoxicated (DWI) as a chronic offender under §577.023 RSMo. (Supp. 2012). (Resp. Ex. C). On June 24, 2013, Hodges pled guilty as charged. (Brief at 4). The court found Hodges to be a chronic offender and sentenced Hodges to five years imprisonment. (Brief at 4). At Hodges' request, the court ordered that he be placed in the long-term treatment program under §217.362 RSMo. (Brief at 4; Suggestions in Opposition at 1).

The Department of Corrections ("Corrections") received Hodges four days later on June 28, 2013. (Resp. Ex. A at 3). With jail time credit of twenty days, his sentence start date was calculated to be June 8, 2013. (Resp. Ex. A at 3). Because Hodges is a chronic offender, he is ineligible for early release until June 8, 2015. Section 557.023.6(4) RSMo. (Supp. 2012).

Hodges successfully completed the long-term treatment program. (Resp. Ex. B). The Missouri Board of Probation and Parole ("Board") notified the court of Hodges' successful completion and advised that Hodges would be eligible for probation release on June 8, 2015, two years after his sentence start date. (Resp. Ex. B at 1). The court adopted the Board's probationary

release date and directed Hodges' to be released on probation June 8, 2015. (Pet. Ex. 3).

On January 9, 2015, Hodges filed a Motion for Release. (Resp. Ex. C). On January 13, 2015, the court set a hearing on the motion and expressly noted that "Defendant remains in DOC until 6/8/15 pursuant to 577.023.6(4) RSMO and not under 217.362 RSMO." (Resp. Ex. C). After the hearing on March 3, 2015, the court issued the following order:

Defendant having completed long-term treatment program pursuant to 217.362 RSMo., the state is not opposed to Motion for Release. The court notes that defendant was sentenced as a chronic dwi offender and the [sic] pursuant to 577.023.6(4) RSMo defendant is required to serve 2 years before eligible for probation. Court does not object to release under Chapter 217 if Department of Corrections finds that defendant is eligible for release despite 577.023(4) [sic] RSMo.

(Resp. Ex. C). The court did not vacate its prior order directing Hodges to be released on probation upon completion of his mandatory-minimum term on June 8, 2015.

Hodges filed a petition for writ of mandamus in the Missouri Court of Appeals on March 12, 2015. *State ex rel. Hodges v. Asel*, WD78423 (Mo. App. W.D., Mar. 18, 2015). The court denied the writ.

Hodges filed a petition for writ of mandamus in this Court on April 3, 2015. The Court issued an order directing the parties to brief the matter.



## SUMMARY OF THE ARGUMENT

Missouri law requires that chronic intoxication related traffic offenders (“chronic offenders”) serve a two-year term of imprisonment before being eligible for early release. Section 577.023.6(4) RSMo. (Supp. 2005). Because Hodges is a chronic offender, he must satisfy this requirement before can be released on probation.

Hodges asks this Court to issue a writ compelling the sentencing court to immediately place him on probation before completion of his mandatory-minimum term because he successfully completed the long-term treatment program under §217.362 RSMo. Neither §577.023 nor §217.362 dictates this result.

Sections 217.362 and 577.023 do not conflict. The terms of §217.362 do not command Hodges’ immediate probation release, but instead require the Board to advise the sentencing court of an offender’s probationary release date upon successful completion of the program. The sentencing court must either: (1) permit the offender’s probation release; or (2) execute the offender’s sentence. In compliance with both statutes, Hodges’ probationary release date was scheduled for the date he satisfies his mandatory-minimum term under §577.023.6(4).

Even if this Court determines that these statutes conflict, then Hodges is still not entitled to the relief he seeks. When the statutes are read

harmoniously together and both given effect, it reflects that the legislature gave courts the sentencing option of §217.362 to order chronic offenders to complete long-term treatment *and* retain discretion to order a successful offender's probation release on the date they satisfy their mandatory-minimum term. But, if the statutes cannot be read together, then the mandatory-minimum requirements of §577.023 must control because it is the later enacted and more specific statute.

This Court should enforce the two-year mandatory-minimum requirement commanded by §577.023.6(4) and deny the petition for a writ of mandamus.

## ARGUMENT

### *Standard of Review*

To receive mandamus, a relator must prove that he has a clear, unequivocal, specific, and positive right to have the requested relief, and the remedy will not lie if the right to this relief is doubtful. *State ex rel. Mo. Growth Ass’n v. State Tax Comm’n*, 998 S.W.2d 786, 788 (Mo. 1999). To determine whether the relator’s right to mandamus is clearly established and presently existing, the court examines the statute under which the relator claims the right. *State ex rel. Dehn v. Schriro*, 935 S.W.2d 641, 644 (Mo. App. W.D. 1996). Because Hodges fails to demonstrate a clear and unequivocal right to relief, the petition for a writ of mandamus must be denied.

**I. Respondent Asel acted within her authority when she issued an order directing Hodges’ probation release upon completion of his mandatory minimum two-year imprisonment – Responding to Relator’s Point I.**

“The primary rule of statutory interpretation is to ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider the words in their plain and ordinary meaning.” *State v. McLaughlin*, 265 S.W.3d 257, 267 (Mo. 2008). In determining the intent and meaning of statutory language, the words must be considered in context and sections of the statutes *in pari materia* to determine the true

meaning and scope of the words. *Id.* When both statutes are read together, they authorize courts to grant probation to chronic offenders who successfully complete the §217.362 long-term program once they satisfy service of their mandatory-minimum imprisonment term under §577.023.6(4), not before that date.

**A. Under §577.023, Hodges must serve two years imprisonment before he is eligible for early release.**

A person found to be a chronic offender under §577.023 is ineligible for early release for two years. Section 577.023.6(4), RSMo. (Supp. 2012). The purpose of §577.023 is to impose enhanced penalties for recidivists who continue to commit intoxication-related traffic offenses, either alone or in combination with other listed offenses. Chronic offenders must serve a mandatory-minimum term of imprisonment before they are eligible for early release. Specifically, “[n]o chronic offender shall be eligible for parole or probation until he or she has served a minimum of two years imprisonment.”

*Id.*

Hodges was sentenced on June 24, 2013, and was received by the Department on June 28, 2013. (Resp. Ex. A at 3). Hodges received twenty days of jail time credit, resulting in a sentence start date of June 8, 2013. (Resp. Ex. A at 3). Because the court found Hodges was a chronic offender, he is not eligible for probation until June 8, 2015 – after he has completed two

years imprisonment. Section 577.023.6(4) RSMo. (Supp. 2012). In compliance with §217.362 and §577.023.6(4), the court's November 2014 probation order directs Hodges to be released on June 8, 2015, the probationary release date proposed by the Board. (Resp. Ex. C; Pet. Ex. 3).

**B. Sections 217.362 and 577.023 do not conflict.**

Section 577.023.6(4) sets forth the minimum time a chronic offender must serve before he or she is eligible for early release. It states, “[n]o chronic offender shall be eligible for parole or probation until he or she has served a minimum of two years imprisonment.” Section 577.023.6(4) RSMo. (Supp. 2012). Section 217.362 governs the Department of Correction's long-term treatment program and authorizes the sentencing court to grant or deny probation release to offenders who successfully complete the program. It states in pertinent part:

Upon successful completion of the program, the board of probation and parole shall advise the sentencing court of an offender's probationary release date thirty days prior to release.

If the court determines that probation is not appropriate the court may order the execution of the offender's sentence.

Section 217.362.3 RSMo. (Supp. 2003).

A reading of these two statutes reveals no conflict. Instead, when read together, they demonstrate one consistent legislative policy—that chronic

offenders be able to complete the intensive substance abuse treatment they need for rehabilitation and still satisfy the punitive interest of requiring recidivists to serve a longer period of time in custody before they are eligible for early release.

The plain language of §217.362 does not require courts to order an offender's *immediate* probation release after successful completion of the program. Section 217.362 gives the court the option to sentence offenders to a long-term treatment program, and it directs the Board to notify the sentencing court of an offender's probationary release date thirty days before release if an offender successfully completes the program. That is what occurred here.

Upon Hodges' successful completion of the §217.362 program, the Board notified the sentencing court that Hodges' probationary release date was scheduled for June 8, 2015, the date he completed his mandatory-minimum two-year term required by §577.023.6(4) RSMo. (Resp. Ex. A and B). Respondent adopted the Board's recommendation and issued an order scheduling Hodges' probationary release for that date. (Resp. Ex. C; Pet. Ex. 3). In taking the actions described above, the Board and the court complied with and gave effect to both §217.362.3 and §577.023.6(4).

Hodges cites *State ex rel. Salm v. Mennemeyer*, 423 S.W.3d 319 (Mo. App. E.D. 2014) and *State ex rel. Sandknop v. Goldman*, 450 S.W.3d 499 (Mo.

App. E.D. 2014) as authority for his argument that he is entitled to immediate probation release under §217.362 upon successful completion of the program. (Brief at 9–10). But neither *Salm* nor *Sandknop* directly addressed the question before this Court – whether a sentencing court can grant probation to a chronic offender before he has satisfied the two-year mandatory-minimum term because he successfully completed the §217.362 program.

In *Salm*, the offender pled guilty to stealing and was sentenced to seven years' imprisonment. *Salm*, 423 S.W.3d at 320. The court also ordered that Salm complete the Department's program under §217.362 RSMo. *Id.* Upon Salm's successful completion of the program, the Board informed the sentencing court that Salm's probation release was scheduled for October 15, 2013, but incorrectly stated that the court had the option to "retain jurisdiction of Salm's case up to twenty-four months" after completion of the program under §217.362 RSMo.<sup>1</sup> *Id.* Based on this information, the

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<sup>1</sup> The Department's interpretation in *Salm* appears to have rested on the following statutory language "the court may sentence a person to the program which shall consist of institutional drug or alcohol treatment for a period of at least twelve and no more than twenty-four months." Section 217.362.2 RSMo. (Supp. 2003). However, in *Salm* the court held that

sentencing court rejected Salm's October 2013 probation release date, and ordered Salm to remain in the Department's custody for an additional twelve months only to be placed on probation in October 2014. *Id.* The Missouri Court of Appeals held that §217.362 did not authorize the sentencing court to retain jurisdiction for an additional twelve months. *Id.* at 321. The court held "upon an offender's successful completion of the long-term treatment program, the trial court must: (1) allow the offender to be released on probation; or (2) determine that probation is not appropriate and order the execution of the offender's sentence." *Id.* Thus, under §217.362, the sentencing court's only options were to: (1) accept the probation release date proposed by the Board (October 15, 2013); or (2) execute Salm's original sentence. *Id.* at 322.

Unlike Hodges' sentence, Salm was not required to complete any mandatory-minimum term before he was eligible for early release. Thus, Salm's sentence was governed solely by §217.362 and the sentencing court in that case was not authorized under §217.362, or *any other statute*, to reject

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§217.362 authorized and directed the Department, not the court, to determine the duration of the long-term treatment program consistent with the statutory time requirements, and the Department's program was twelve months. *Salm*, 423 S.W.3d at 321.



the Board's probationary release date and set a future probation release date. Accordingly, the Board's probation release date is June 8, 2015, the date Hodges completes his two-year imprisonment requirement under §577.023.6(4). Because this date is required by §577.023.6(4), and neither *Salm* nor §217.362 prohibit it, the sentencing court properly accepted the June 8, 2015, as Hodges' probation release date in this case.

In *Sandknop*, the Missouri Court of Appeals expressly declined to decide whether §217.362 and §577.023 conflict because the sentencing court's probation order did not invoke either statute. *Sandknop*, 450 S.W.3d at 502 n. 2. Sandknop pled guilty as a chronic offender to one count of driving while intoxicated. *Id.* at 500. The court sentenced Sandknop to ten years in the Department and ordered that he be placed in the long-term treatment program under §217.362. *Id.* at 500–01. After Sandknop successfully completed the program, the sentencing court, on its own motion, entered an “Amended Order of Probation Pursuant to Section 559.115 RSMO.” *Id.* at 501. The sentencing court's order, without reference to either §217.362 or §577.023, suspended Sandknop's sentence pursuant to §559.115, and ordered his probation release at a future date nearly eight months after Sandknop successfully completed the program. *Id.* The appellate court reiterated its previous holding from *Salm* and held that the sentencing court authority under §217.362 is limited to “two alternative actions” when an offender

successfully completes the program: “the circuit court must either release the defendant on probation or execute the defendant’s sentence if the court determines that probation is not appropriate.” *Id.* at 502.

Here, the court took appropriate action within the constraints of Missouri law. Although the court’s November 2014 order does not expressly invoke §577.023, the order adopts the Board’s probationary release date as set forth in its report, which was calculated according to Hodges’ sentence under §577.023.6(4). In its report, the Board stated:

Subject is scheduled to complete the one-year treatment program on 12-31-2014, but he was sentenced as a chronic offender on Case No. 13BA-CR00008-01 and cannot, by law, be released on probation on that case prior to serving two years incarceration, which said date is 6-08-2015. This is the NOTICE OF STATUTORY DISCHARGE. Subject will be scheduled for release on the chronic DWI date of 6-08-2015.

(Resp. Ex. B at 1). By adopting this recommendation, the court’s order grants Hodges probation release within the statutory limits set forth in §577.023 RSMo. Because this date is authorized by §577.023.6(4), and neither *Sandknop* nor §217.362 prohibit it, the sentencing court properly accepted the June 8, 2015, as Hodges’ probation release date in this case.

**II. Even if the Court were to find that a conflict exists between §217.362 and §577.023, then the statutes can be read harmoniously together, and if that is not possible, then §577.023 controls because it is the later enacted and more specific statute – Responding to Relator’s Point II.**

When “two statutory provisions covering the same subject matter are unambiguous standing separately but are in conflict when examined together, a reviewing court must attempt to harmonize them *and give them both effect.*” *South Metro. Fire Prot. Dist. v. City of Lee’s Summit*, 278 S.W.3d 659, 666 (Mo. 2009) (emphasis supplied). Only if the statutes cannot be read in harmony, “a chronologically later statute, which functions in a particular way will prevail over an earlier statute of a more general nature, and the latter statute will be regarded as an exception to or qualification of the earlier general statute.” *Id.* “[W]here one statutes deals with the subject in general terms and the other deals in a specific way, to the extent they conflict, the specific statute prevails over the general.” *State ex rel. Taylor v. Russell*, 449 S.W.3d 380, 382 (Mo. 2014).

**A. Sections 217.362 and 571.023.6(4) can be harmonized, and both statutes can be given effect.**

Hodges argues that §217.362 and §577.023.6(4) conflict. To resolve this conflict, Hodges correctly notes that this Court must attempt to harmonize

conflicting statutes and give them both effect, but he incorrectly asks this Court to resolve this alleged conflict by disregarding the mandatory-minimum imprisonment term chronic offenders must serve. (Brief at 10–12). He also suggests that §577.023 is a “general” statute enacted first, and it must give way to the “specific” statute of §217.362 enacted later in time. (Brief at 14, 20, 22, 23–24). Because the two statutes can be read harmoniously together, this Court need not reach the issue of which statute is controlling. However, even assuming there is a conflict between the statutes, which there is not, §577.023 controls because the chronic offender provisions were enacted later and are more specific than §217.362.

If this Court determines that §217.362 and §577.023.6(4) conflict, then the statutes can be read harmoniously together and both be given effect as the Board and court have done in this circumstance. When both statutes are given effect, courts would have the sentencing option of §217.362 to order chronic offenders to complete long-term treatment *and* retain discretion to order a successful offender’s probation release on the date they complete their mandatory-minimum term. Chronic offenders benefit from this harmonious reading because they could continue to receive treatment under §217.362 and may receive probation once they’ve completed the program and satisfied their mandatory-minimum term. The possibility of probation, whether ordered immediately or a few months after completion of the program, still serves as

an incentive for chronic offenders to successfully complete the program. This is especially true in light of the alternative – serving a sentence of imprisonment without the possibility of probation. Section 217.362.4 RSMo. (Supp. 2003) (“Failure of an offender to complete the program shall cause the offender to serve the sentence prescribed by the court and void the right to be considered for probation on this sentence.”).

Hodges’ interpretation of the two statutes would lead to unreasonable results. A reviewing court must use rules of statutory construction that “subserve rather than subvert legislative intent.” *Elrod v. Treasurer of Mo.*, 138 S.W.3d 714, 716 (Mo. 2004). “All canons of statutory construction are subordinate to the requirement that the court ascertain and apply a statute in a manner consistent with the legislative intent.” *Williams v. Nat’l Cas. Co.*, 132 S.W.3d 244, 249 (Mo. 2004). “Construction of statutes should avoid unreasonable or absurd results.” *Reichert v. Bd. of Educ. of St. Louis*, 217 S.W.3d 301, 305 (Mo. 2007).

The harmonious reading of §217.362 and §577.023 best effectuates the intent of the General Assembly – that chronic offenders receive the treatment they need with the possibility of probation, but still require recidivists to serve a longer term of imprisonment before being eligible for early release. If §217.362 can be utilized to circumvent §577.023’s mandatory-minimum requirements, then courts may stop ordering long-term treatment to

offenders who most need it, precluding chronic offenders from treatment under §217.362 and precluding them from probation.

Furthermore, compelling the court to decide the issue of whether probation should be granted *before* completion of the legislature's mandatory-minimum term under §577.023.6(4), may not lead to the result Hodges seeks. If this Court adopts Hodges' position that the sentencing court take one of two options upon successful completion of the program: (1) immediate probation release; or (2) execution of the full sentence, many courts may choose to deny probation to offenders who have not satisfied their mandatory-minimum term of imprisonment because the offender's early release is prohibited under §577.023.6(4) RSMo. Immediate execution of the sentence would avoid Hodges' manufactured conflict argument because that choice, while disadvantageous to Hodges, would give full effect to both statutes.

**B. Section 577.023 controls because it is the later enacted and more specific statute.**

If §217.362 and §577.023.6(4) cannot be read in harmony together, then §577.023.6(4) is controlling because it is the later enacted and more specific statute.

Section 217.362, last amended in 2003, is a general statute that authorizes the Department to develop a long-term treatment program for the treatment of chronic nonviolent offenders with serious substance abuse

addictions and permits the courts to sentence qualifying offenders to that program and retain authority to grant probation, if appropriate. This statute designates general duties required by the Department and the courts for offenders who are sentenced to this program. At issue here, this statute vests the court with general discretion to grant probation release to offenders who successfully complete the program.

Section 577.023 applies only to recidivist intoxication-related traffic offenders and establishes their enhanced punishments. The applicable provisions in §577.023 were enacted *after* §217.362. In 2005, the legislature amended §557.023 to include a new category of recidivists – “chronic offender.” Section 577.023.1(2), RSMo. (Supp. 2005). Section 577.023 imposes specific limitations against granting early release. This statute *removes* the court’s authority to grant probation or parole, and the Board’s ability to grant parole, to recidivist offenders until satisfaction of their mandatory-minimum term. In other words, while courts have the option to sentence recidivist intoxication traffic-related offenders to the long-term treatment program under §217.362, the legislature specifically determined that these recidivists must serve a specific minimum imprisonment term before they are eligible for early release, regardless of whether the court opts to place them in treatment or not. These specific exclusions must prevail over the general discretion granted by §217.362.

It is also presumed that the legislature was aware of §217.362 when it amended §577.023 in 2005 to establish chronic offenders' mandatory-minimum terms. See *Turner v. School District of Clayton*, 318 S.W.3d 660, 667–68 (Mo. 2010). Thus, if the legislature wished to exempt chronic offenders from serving the two-year mandatory-minimum imprisonment in cases where the offender successfully completes the long-term program, then it certainly could have amended either statute to exclude the mandatory-minimum requirement. It did not. Because §577.023.6(4) is the later enacted and more specific statute, it would control in the event this Court finds a conflict between §217.362 and §577.023.

Hodges also asks this Court to apply the rule of lenity and find that §217.362 is controlling. The rule of lenity is not applicable here because §217.362 and §577.023.6(4) are not ambiguous. “[T]he rule of lenity mandates that all ambiguity [in a criminal statute] be resolved in a defendant's favor.” *State v. Chambers*, 437 S.W.3d 816 (Mo. App. W.D. 2014) (quotation omitted). Even if an ambiguity was present, which it is not, this Court can resolve the ambiguity by utilizing the statutory construction above. See *State v. Liberty*, 370 S.W.3d 537, 547 (Mo. 2012) (“[T]he rule of lenity applies to interpretation of statutes only if, after seizing everything from which aid can be derived, we can make no more than a guess as to what the legislature intended.”). This argument is without merit and should be denied.



**III. The Department is authorized to calculate Hodges' mandatory-minimum term, and he is lawfully in custody – Responding to Relator's Point I.**

In Point I, Hodges argues that Respondent Asel improperly delegated her authority to determine whether Hodges was eligible to be released on probation to Respondent Lombardi. (Brief at 18–19). He also argues that Hodges' current custody is unlawful. (Brief at 19). His arguments are meritless.

The Department is responsible for ensuring Missouri sentences are executed in compliance with Missouri law. Under Missouri's statutory scheme, the Department calculates the service of prison sentences; this includes calculating any mandatory-minimum terms that offenders must serve before being eligible for early release. *See State ex. rel Jones v. Cooksey*, 830 S.W.2d 421, 425–26 (Mo. 1992) (holding that calculating and awarding jail time served is within the authority of the Department); Section 558.031 RSMo. (2000); Section 558.019 RSMo. (Supp. 2012); Section 217.690 RSMo. (Supp. 2005). As discussed above, the Department's calculation of Hodges' mandatory-minimum term was in compliance with §577.023.6(4). Indeed, Hodges' does not dispute the date calculated by the Department, but only argues that he should not be required to serve his mandatory-minimum term.

Because Hodges has not yet satisfied §577.023.6(4)'s requirements, he is lawfully incarcerated.

**IV. The prosecutor cannot waive the mandatory-minimum required under §577.023.6(4) – Responding to Relator’s Point III.**

Hodges argues that the prosecutor waived any objection to Hodges’ release before completion of the mandatory-minimum term because the prosecutor did not object to Hodges’ placement in the §217.362 program and did not object to his request to be released before satisfying his two-year term. (Brief at 28).

Hodges cites to no authority to support his argument that the prosecutor can waive his mandatory-minimum requirement. The General Assembly commands that chronic offenders must serve two-years imprisonment before they are eligible for early release. Section 577.023.6(4) RSMo. (Supp. 2012). The prosecutor cannot relinquish this mandatory-minimum requirement any more than the prosecutor could agree to the imposition of a void and illegal sentence. Furthermore, the prosecutor has no authority to calculate or enforce mandatory-minimum imprisonment requirements. This authority rests with the Department. The Department must comply with Missouri law and has done so here.

## CONCLUSION

The Court should deny the petition for a writ of mandamus.

Respectfully submitted,

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## **CERTIFICATE OF COMPLIANCE AND SERVICE**

Undersigned counsel hereby certifies that the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 4,679 words, excluding the cover, certification and appendix, as determined by Microsoft Word 2010 software, and that a copy of this brief was sent through the electronic filing system on May 12, 2015 to:

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